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In The

Supreme Court of the United States

October Term, 1984

SKLUT HIDE & FUR
A DELAWARE CORPORATION,

Petitioner,

vs.

PRUDENTIAL LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THOMAS P. HARTNETT
Counsel of Record
HALLEY & CHALOS
Attorneys for Petitioner
300 East 42nd Street
New York, New York 10017
(212) 697-8118

2227
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QUESTIONS PRESENTED

1. Whether this Court should now answer the frequently litigated conundrum as to the definition of a maritime package, in order to promote uniformity and predictability for the maritime industry and the various courts regularly confronting this issue?

2. Whether a Bill of Lading is a contract of adhesion?

THE PARTIES

The parties before this Court are those set forth in the caption.[1]

1. Pursuant to Rule 28.1 there are no other first generation subsidiaries or affiliates. Accordingly, Petitioner is not a corporate parent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Sklut Hide & Fur, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in these proceedings.

OPINIONS BELOW

The District Court's opinion denying summary judgment was officially reported at 537 F. Supp. 266 (D. Del. 1982) and is annexed hereto as Appendix A. The District Court's trial opinion was not officially reported and is annexed hereto as Appendix

B. The order of the Circuit Court of Appeals was reported at 755 F. 2d 923 (3rd Cir. 1985) and is annexed hereto as Appendix C. The Court of Appeals' denial of reargument or rehearing en banc is unreported and is annexed hereto as Appendix D.

JURISDICTION

The order of the Court of Appeals was entered on January 29, 1985. Denial of reargument and rehearing en banc was entered on February 26, 1985. A certified copy of the original order of the Court of Appeals was issued in lieu of a formal mandate on March 6, 1985. This petition for certiorari was filed within 90 days from that date.

The Court's jurisdiction is predicated upon 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution provides that:

> The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between citizens of the same State claiming Lands under

> Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 1333 of the Judicial Code, 28 U.S.C. §1333, provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

STATEMENT OF THE CASE

Petitioner Sklut Hide & Fur Company (hereinafter "Sklut") is a Delaware dealer and exporter of cattle hides to Europe and the Far East. On or about March 27, 1980 Sklut entered into a contract of carriage with Prudential Lines, Inc. (hereinafter "PLI"), an American flag operator of ocean going vessels. PLI contracted to transport 400 bundles of wet, salted cattle hides[2] on its vessel SS LASH ATLANTICO. Carriage was to be a "house to house" move[3] from the Port of New York to the consignee

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2. A bundle of hides is traditionally measured as approximately eighteen inches by eight inches bound with thistle.

3. A "house to house" move requires a shipper to pack the container and deliver it to the ocean going carrier at the port of loading for further loading aboard a vessel and shipment to the port of destination. At such a port the (Cont'd)

at San Croce Sull Arno, Italy via the Port of Leghorn, Italy. As evidence of the contract of carriage, PLI issued its standard form ocean Bill of Lading. A copy of the front and back of the Bill of Lading is set forth as Appendix "E", which is annexed hereto.

In the "No of PKGS" column there was listed the Number "1" and partially "400". In the next column "Description of Packages and Goods" on corresponding lines read:

> "CONTAINER STC" AND "BUNDLE: WET SALTED CATTLE HIDES".

Sklut paid ocean freight to PLI in the amount of $1,538.57 for transportation from the Port of New York to San Croce Sull Arno. At PLI's insistence the goods were stuffed into one container and loaded on board the vessel.

On or about April 20, 1984 the vessel arrived not at Leghorn but rather at Genoa, Italy. PLI discharged the cargo there and turned it over to its local trucker, Aldo Spinelli, S.A. for transportation to San Croce Sull Arno.

On June 1, 1980 the goods were stolen, while in Spinelli's possession. Several days later, the container was found empty.

On November 20, 1980 Sklut instituted a civil action in the United States District Court for the District of Delaware. Jurisdiction was predicated in admiralty pursuant to 28 U.S.C. §1333. In its complaint Sklut alleged that PLI breached its contract of carriage because of the nondelivery of the goods.

(Cont'd)

container is unloaded from the vessel and taken to a container yard where it is picked up by a trucking company for delivery to the ultimate consignee. *See Koppers Co. Inc. v. S. S. DEFIANCE, et al*, 542 F. Supp. 1356 (D.Md.) , *aff'd*, 704 F. 2d 1309 (4th Cir. 1983).

On November 23, 1981 PLI moved for summary judgment dismissing the complaint pursuant to Clause 2 of its Bill of Lading. The District Court Judge denied PLI's motion. This decision denying summary judgment is annexed hereto as Appendix "A".

On September 20, 1983 a trial was held. On December 23, 1983 the District Court issued a memorandum opinion, which is annexed hereto as Appendix "B".

The District Court held PLI liable to Sklut for the nondelivery of the cargo. However it found that, as the loss had occurred subsequent to discharge from the vessel, any type of package analysis would not apply. Instead, the District Court claimed that the loss would be limited to $500, since the parties had apparently contracted to this in Paragraph 17 of PLI's preprinted form. The Court did concede that, had the loss occurred prior to discharge, a package analysis, as set forth in *Smithgreyhound v. M/V EURYGENES,* 666 F. 2d 746 (2d Cir. 1981), would have applied and would have given Sklut its requested *ad damnum.* Notwithstanding this fact, the Court refused to use any type of package analysis and awarded Sklut only $500 plus interest from the date of loss.

Sklut then appealed to the United States Court of Appeals for the Third Circuit. PLI also crossappealed. On January 29, 1985 the Third Circuit issued a memorandum order, affirming the various decisions and final judgment of the District Court. Sklut then moved for rehearing or reargument en banc. On February 26, 1985 the Third Circuit denied both requests. Sklut now petitions this Court for a writ of certiorari.

ARGUMENT

A UNIFORM DEFINITION OF WHAT IS A MARITIME PACKAGE MUST BE FORMULATED BY THIS COURT.

Since the earliest days of this Republic and because of the constitutional grant of maritime jurisdiction to the federal judiciary, Article III courts have been given broad powers to determine maritime issues. *United States v. Schooner Betsy & Charlotte,* 8 U.S. (4 Cranch) 443 (1808). Furthermore, the international scope of maritime transactions has necessitated concerted judicial attempts for uniformity and predictability in maritime affairs.

Perhaps no other issue in contemporary maritime law has generated so much writing, be it adversarial, judicial or scholarly, than that "troublesome conundrum 'when is a package not a package?' " *Mitsubshi International Corp. v. S.S. PALMETTO STATE,* 311 F. 2d 382, 383 (2d Cir. 1962), *cert. denied,* 373 U.S. 922 (1963). At the core of the problem lies 46 U.S.C. §1300, *et seq.*, Carriage of Goods by Sea Act (hereinafter "COGSA"), and most especially §1304 (5), the so called "package limitation".[4] Judicial decisions, both on the trial and appellate level, have frequently heen gnostic in their quest to answer this maritime variation of the Sphinx' legendary riddle. They have furthermore become almost hermeneutical in their analysis of the statutory basis of the "package limitation" in the hope of gleaning "what

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4. When COGSA was enacted in 1936, it reflected the conventional value of a package shipped at that time. Consequently, even for moves not totally covered by COGSA, carriers generally inserted the $500 package limitation into their Bills of Lading. However, with the advent of containerization and the internationalization of commerce, this figure has become hopelessly unrealistic and nugatory in value. *See* Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975).

Congress would have thought about a subject about which it never thought or could have thought". *Commonwealth Petrochemicals Inc. v. SS Puerto Rico,* 455 F. Supp. 310, 313 (D. Md. 1978), *rev'd on other grounds,* 607 F. 2d 322 (4th Cir. 1979). Even requests to the Executive Branch to fashion a proper formulary have also come to nought. *See Denial of Petition of Dow Chemical for definition of package,* Federal Maritime Commission, (April 5, 1985).

To complicate this quagmire, courts like the District Court in the instant action have also had to deal with permutations where COGSA does not apply *ex propio vigore* and where two different and contradictory results may arise, depending on the situs of the loss and its relative proximity to the vessel. *Pannell v. United States Lines, Inc.,* 263 F. 2d 497 (2d Cir. 1959), *cert. denied,* 359 U.S. 1013 (1959). Thus, due to lack of ultimate judicial guidance from this Court, courts nationwide have literally struggled to formulate a hard and fast test in order to ascertain what is a maritime package. Is it solely the container as defined, for example, in PLI's Clause 17, or is it, as was asserted by Sklut at the trial and appellate levels, the contents of the container?

The most common and widely recognized standard has been set forth by the Second Circuit. Starting with *Leather's Best v. S/S Mormaclynx,* 451 F. 2d 800, 815 (2d Cir. 1971) through *Mitsui, supra,* and *Allied International American Eagle Trucking Corp. v. SS Yang Ming,* 672 F. 2d 1055 (2d Cir 1982) to the recently decided *Binladen BSB Landscaping v. M/V Nedlloyd Rotterdam,* No. 84-7710 (2d Cir. April 3, 1985), the Second Circuit has attempted to offer practical guidelines to deal with the package quandry. As noted in *Binladen, supra,* slip opinion at 2993-2996, four criteria have been and should be used by the judicial forum in determining what is a package. The touchstone should be a review of the contractural agreement between the parties, as set forth in the Bill of Lading. *Id.* at 2994. The second element should

be an analysis of the preparation of the cargo for transportation. *Id.* at 2995. The third should be a judicial refusal to accept the container as the sole package if the contents and the number of packages or units are disclosed on the face of the Bill of Lading. *Id.* Finally, there should be a tacit judicial classification that goods, not separatelv packaged, should be classified as goods not shipped in packages, for which the $500 limit would be per "customary freight unit". *Id.* at 2996.

Outside the Second Circuit other courts, usually on the trial level, have used other tests for package determination. The most notable was set forth in *Matter of Norfolk, Baltimore & Carolina Line,* 478 F. Supp. 383 (E.D. Va. 1979). *See also, Croft & Scully Co. v. M/V SKULPTOR VUCHETICH,* 508 F. Supp. 670 (S.D. Tx. 1981). *But see, Smithgreyhound v. M/V EURYGENES,* 1980 A.M.C. 2270 (SDNY 1980). In *NBC, supra* at 392, the trial judge set forth the following twelve criteria that should assist the trier of fact in any package analysis.

> (1) Whether the carrier actually possesses superior bargaining strength sufficient to coerce the shipper's agreement to an adhesion contract;
>
> 2) Whether the parties treated the container as a single unit in their negotiations, on the document of contract, and in determining the shipping rate;
>
> (3) Whether the shipper, or at least one other than the carrier, chose to ship the goods in container;
>
> (4) Whether the shipper or carrier procured the container;

(5) Whether the goods were delivered to the carrier previously loaded into the container;

(6) Whether the goods were loaded by the shipper or by the carrier;

(7) Whether the carrier actually observed the contents of the container before it was sealed for shipment;

(8) Whether the container was loaded with the shipper's goods only, and not those of any other shipper;

(9) Whether the markings on the container provided a complete and accurate indication of the contents and their value;

(10) Whether the bill of lading contained any declaration of the nature of the container's contents and their value;

(11) Whether the bill of lading provided the shipper with an adequate opportunity to declare the value of the container and its contents, and to obtain financial protection for any excess value;

(12) Whether the shipper took advantage of this opportunity. *NBC, supra* at 392.

A comparison of the holdings in this litigation, when scrutinized under the various tests discussed *supra*, evidences that both the Trial Court and the Third Circuit opted for a simplistic answer to the question as to what was the maritime package here. Furthermore, the Third Circuit, unlike other Circuit Courts of

Appeal, has never directly confronted the issue of package definition. This is true, even though the Third Circuit includes the major Ports of New Jersey, Philadelphia, Wilmington and others of lesser size. Sklut contends that the Third Circuit deliberately refrained from answering the package question and, by so doing, tacitly accepted the clearly erroneous holding of the Trial Court. Judgment of only $500 was erroneously awarded by reliance upon invocation of the microscopic, preprinted, and adhesive language of PLI's Clause 17. Sklut believes that this false conclusion was primarily based upon the uncertain state of, and confusion over, package analysis.

Accordingly, petitioner respectfully requests that this Court finally intervene, put to rest this long standing dispute and give authoritative guidance to the maritime industry and to the federal judiciary who have both struggled over this matter.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

THOMAS P. HARTNETT
Counsel of Record

HALLEY & CHALOS
Attorneys for Petitioner

APPENDIX A — DECISION DENYING SUMMARY JUDGMENT

SKLUT HIDE AND FURS, a Delaware corporation,

Plaintiff,

v.

PRUDENTIAL LINES, INC., a Delaware corporation,

Defendant

Civ. A. No. 80-552

United States District Court,
D. Delaware.

April 2, 1982

Shipper brought action in admiralty for loss of cargo carried in ocean transportation from United States to Italy by carrier. On carrier's motion for summary judgment, the District Court, Steel, Senior District Judge, held that: (1) bill of lading exculpatory clause was null and void under Harter Act, and (2) shipper's written notice of loss or damage was timely.

Motion denied.

1. Shipping key 140(1)

Although Carriage of Goods by Sea Act provided that its terms would not prevent carrier or shipper from entering into agreement as to liability for loss of or damage to goods prior to loading on and subsequent to discharge from ship, where it

also provided that it was not to be construed as superseding any other law relating to liabilities of ship after time when goods are discharged from ship, COGSA was enacted in 1936, and Harter Act, which was enacted in 1893, made null and void exculpatory words or clauses in bills of lading purporting to relieve vessel owner of liability for loss or damages for failing to make proper delivery of property transported, COGSA could not be applied to render enforceable exculpatory clause in bill of lading. Carriage of Goods by Sea Act, §§ 7, 12, 46 U.S.C.A. §§ 1307, 1311; Harter Act, § 1, 46 U.S.C.A. § 190.

2. Shipping key 140(1)

Under Harter Act, exculpatory clause of bill of lading between shipper and carrier was null and void and of no effect insofar as it purported to relieve carrier from responsibility for loss to shipper's cargo prior to delivery to cargo destination. Harter Act, § 1, 46 U.S.C.A. § 190.

3. Shipping key 142

Although shipper's goods were stolen from possession of inland carrier on or about June 2, 1980, before delivery to cargo destination, shipper was officially informed by carrier on June 4, 1980, that container was stolen, and shipper's written notice of loss or damage was allegedly not received by carrier until June 9, 1980, such notice was timely where, under bill of lading, three-day notice requirement had application only if loss was not apparent, theft was obviously apparent inasmuch as shipper was officially informed by carrier that container was stolen, and, under the circumstances, it would be inequitable to bar shipper's claim.

Appendix A

Kester I. H. Crosse, Wilmington, Del., for plaintiff.

Thomas Herlihy, III, of Herlihy, Herlihy & Harker, Wilmington, Del., for defendant; Douglas H. Riblet, of Rawle & Henderson, Philadelphia, Pa., of counsel.

STEEL, Senior District Judge.

Plaintiff, Sklut Hide and Furs ("Sklut") has brought this action in admiralty for the loss of cargo carried in ocean transportation from the United States to Italy. Jurisdiction is based upon 28 U.S.C. § 1333. Now before the Court is the motion of the defendant, Prudential Lines, Inc. ("Prudential") for summary judgment pursuant to Fed.R.Civ. P. 56(b).

On March 27, 1980, plaintiff and defendant entered into a contract of carriage, Bill of Lading No. 1001, for the transportation of a container of 400 wet salted cattle hides aboard the SS Lash Atlantico, an oceangoing vessel owned by Prudential. The bill of lading stated that the "port or place of loading" was New York, the "port or place of discharge" was Leghorn, and bore the following legend:

> "CLEAN ON BOARD—FREIGHT PREPAID BEYOND CHARGES TO SAN CROCE SULL ARNO PREPAID HOUSE TO HOUSE CONTAINER SERVICE"

Plaintiff paid defendant a total of $1,538.57, which included prepaid freight for house to house container service between New York and San Croce Sull Arno.

Appendix A

In due course the container was loaded on the SS Lash Atlantico and was later discharged at Genoa, Italy.[1] Why the discharge was in Genoa and not Leghorn as required by the bill of lading is not explained. After its arrival in Genoa the container was delivered to an inland carrier for transportation to Leghorn where it was to be forwarded to San Croce Sull Arno. The hides never reached their intended destination because on or about June 2, 1980, the container and its contents were stolen from the inland carrier after their arrival in Leghorn. Aldo Spinnelli was the inland trucker engaged by the defendant to complete the overland portion of the contract of carriage. Plaintiff did not employ him or designate him as his agent or servant in connection with the shipment.

The defendant bases its motion for summary judgment on two provisions in the contract of carriage set forth in the bill of lading. Prudential points to Clause 10 in which, it contends, Sklut agreed that Prudential would not be responsible for any loss or damage to Sklut's cargo which occurred while the cargo was not in the actual physical custody, control or possession of Prudential. Defendant argues that this provision is enforceable under the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* In addition, Prudential argues that Sklut did not provide notice of the loss or claim in writing within three days of its occurrence as required by Clause 19 of the bill of lading.

---

1. The affidavit of Joseph C. Benedetti, Secretary of Prudential, relates that the container was discharged in Genoa on May 28, 1980. In contrast, the affidavit of Morton Sklut, President of Sklut Hide, affirms that he was advised by his agent in Italy on May 25, 1980, that the Lash Atlantico actually had arrived in Italy on or about April 30, 1980. This factual disparity is immaterial to the Court's decision.

Appendix A

Clause 10 of the bill of lading provides as follows:

10. TRANSSHIPMENT:

Whenever the carrier or the Master may deem it advisable or in any case where the goods are consigned to a point where the vessel is not expected to discharge, the carrier or Master may, without notice, forward the whole or any part of the goods, before or after loading at the original or any intermediate port of shipment, or at any other place or places, even though outside the scope of the voyage or the route to or beyond the port of discharge or the destination of the goods, by any vessel, vessels or other means of transportation by water, land or air, or by any such means, whether operated by the carrier or by others and whether departing or arriving, or scheduled to depart or arrive before or after the ship expected to be used for transportation of the goods. The carrier, in making any arrangements for transshipment by any means of transportation not operated by it, shall be deemed the forwarding agent of the shipper and consignee without any responsibility whatsoever. The oncarriage shall be subject to the terms of the oncarrier's current form of bill of lading or other contract, whether issued or not, even though such terms may include a lower valuation of the goods or lower limitation of liability or otherwise be less favorable to the shipper or consignee than the terms of this bill of lading. Pending or during transshipment, the goods may be stored ashore or afloat at their risk and expense.

When this bill of lading is issued as a through bill of lading, the cargo described shall be considered to be 'in transit' from the place of original departure or a point where the transportation begins to the place of final destination, and all arrangements made for land, water or air transportation of said goods before, or after,

the described ocean transportation carried out by Prudential Lines, Inc., have been, or will be, made solely as agents for the shipper/consignee and subject to all of the terms and conditions of the originating, connecting or final carrier's bill of lading or other transit document without any responsibility for performance thereunder being assumed by Prudential Lines, Inc. and without enlargement or extension of the responsibility or liabililty on its part to the goods as defined in this bill of lading. It is also expressly understood and agreed that Prudential Lines, Inc. will not be responsible with respect to said goods while they are not in its actual physical custody, control or possession.

Section 7 of COGSA, 46 U.S.C.A. § 1307, provides:

> *§ 1307. Agreement as to liability prior to loading or after discharge.*
>
> Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods were carried by sea.
>
> Apr. 16, 1936, c. 229, § 7, 49 Stat. 1212.

[1] Standing alone Section 7 would authorize the exculpatory provisions in Clause 10 of the bill of lading. Section 7 must read, however, in the light of Section 12 of Cogsa, 46 U.S.C.A. § 1311, which provides:

Appendix A

§ 1311. Liabilities before loading and after discharge; effec. on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

April 16, 1936, c. 229, § 12, 49 Stat. 1212.

This latter provision makes clear that the terms of Section 7 must yield to the extent it is inconsistent with "any other law relating to the duties, responsibilities and liabilities of the ship after the time when they are discharged from the ship."

COGSA was enacted in 1936. Section 1 of the Harter Act, 46 U.S.C. § 190, has been the law since it was enacted in 1893. It makes null and void and of no effect all words or clauses in a bill of lading which purport to relieve an owner of any vessel transporting property between ports of the United States and foreign ports from liability for loss or damages for failing to make proper delivery of property committed to its charge. 46 U.S.C.A. § 190 reads:

§ 190. Stipulations relieving from liability for negligence

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting

> merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. Feb. 13, 1893, c. 105, § 1, 27 Stat. 445.

Accordingly, COGSA is without application in this case since it is inconsistent with Section 1 of the Harter Act.

[2] Two decisions, *Isthmian Steamship Co. v. California Spray-Chemical Corp.*, 290 F.2d 486 (1961), *on reargument*, 300 F.2d 41 (9th Cir. 1962); and *Caterpillar Overseas, S.A. v. S.S. Expeditor*, 318 F.2d 720 (2d Cir. 1963), are especially relevant to an interpretation of the Harter Act. Although they arise from facts dissimilar to those at bar, they establish principles which make Clause 10 null and void and of no effect insofar as it purports to relieve the defendant from responsibility for the loss to plaintiff's cargo after it was discharged at Genoa and was in transit via Leghorn to San Croce Sull Arno.

In *Isthmian Steamship Co. v. California Spray-Chemical Corp., supra*, 290 F.2d 486, libelant had shipped a quantity of agricultural chemicals, known as cotton dust, from Houston, Texas to Alexandria, Egypt on the Steel Architect owned by the respondent. On arrival at Alexandria the cargo was discharged

into lighters for on-carriage to the quays of the Egyptian Petroleum Storage Company. The lighterage was made necessary by Egyptian customs regulations which required that this commodity be landed only at the "petroleum quays." Because of the depth of its draft, the Steel Architect could not come along side the petroleum quays and further transportation was required. The cargo was put aboard the lighters which left the ship and were moored along side the quays. Before delivery of the cargo the lighter sank at her moorings and the cotton dust was damaged by sea water. Libelant sued in admiralty for damages. The cargo had been shipped under short bills of lading which incorporated three "lighterage clauses." These were described at 290 F.2d at 488:

> "These clauses provided that the *carrier should be considered to act solely as the consignee's agent to arrange for lightering in Alexandria's Harbor and to effect 'delivery' of the cargo by discharging it into lighters.*" (emphasis added)[2]

The District Court held that the lighterage clauses were invalid to relieve the carrier of responsibility for negligence in the care of the goods while they were being lightered from the ship to the quays. Upon reargument the judgment of the lower court was affirmed, as modified, in the original opinion.[3] *Isthmian Steamship Co. v. California Spray-Chem Corp., supra,* 300 F.2d 41. The Court said that its earlier opinion rested essentially upon the reasoning embodied in the trial court's decision and that both decisions had held that a carrier could not by contract avoid

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2. This is a summarization of the actual clauses set out in 290 F.2d at 488 n.1.

3. The modification is inconsequential and it is unnecessary to discuss it.

liability for negligent injury to cargo when such injury occurs before the cargo is delivered to a fit and proper wharf. The Court said:

> It would seem, then, that any attempt by the carrier to avoid liability for losses arising before delivery must fail. Once proper delivery has been made, however, the carrier's liability, as far as the Harter Act is concerned, is at an end. It is, therefore essential to determine what a proper delivery is, and *when* such delivery is completed. The court below and this court on appeal held that a proper delivery as defined by general maritime law, occurred when the cargo was deposited upon a fit and proper wharf.

300 F.2d at 43 (emphasis in orginal). And further:

> In the instant case, the negligence which caused the loss occurred *before* such proper delivery was accomplished. If, then, the bill of lading clause involved here is sufficient to save appellant harmless, the Act will have been circumvented.

Id. at 46 (emphasis in original). And:

> The court's opinion did not hold, as appellant seems to believe, that a carrier cannot contract for authority to arrange for lightering of cargo at the shipper's expense; it held only that a carrier cannot relieve itself of liability occurring during such lightering or at any time before proper delivery.

Id. at 47.

Appendix A

In *Caterpillar Overseas, S.A. v. S.S. Expeditor*, 318 F.2d 720, *supra,* the plaintiff shipped two tractors from New York to Tripoli, Libya, on the defendant's vessel, the Expeditor. Because the vessel's draft was too deep for a berth at the port of Tripoli, the ship anchored upon arrival in the Tripoli harbor. There the tractors were transferred from the Expeditor to the deck of a steel lighter which was secured by lines to the ship. After the tractors had been placed on the deck of the lighter and chocked, the lighter listed toward the ship and the two tractors were cast overboard. They were subsequently raised and deposited on the quay in a damaged condition.

The lighter had been hired and the stevedores employed by W.E. Rippon & Sons, the agent for many years of the defendant. The lighterage was billed to the consignee of the cargo, but, as permitted by the bill of lading, the consignee was neither consulted by the ship's agent concerning the use of the lighter nor notified of the arrival of the ship.

Plaintiff sued the American Export Lines for damages to the cargo. The District Court denied recovery. The decision was reversed and remanded upon appeal. Export Lines sought to escape liability by setting up three exculpatory clauses in the bill of lading, the net effect of which was to excuse the carrier from any liability for loss or damage to the goods when they were not in its actual custody, or when they had been discharged onto a wharf or lighter. The exculpatory clauses relied upon were Clauses 1, 4 and 12 which are quoted in 318 F.2d at 722 n. 1, as follows:

> Clause 1: 'The Carrier shall not be liable in any capacity whatsoever for * * * loss of or damages to the goods occurring while the goods are not in the actual custody of the Carrier.'

Appendix A

Clause 4: 'When the goods are discharged from the ship, as herein provided, they shall be at their own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Carrier shall be freed from any further responsibility.'

Clause 12: 'All lighterage and use of craft in discharging shall be at the risk and expense of the goods.'

The Court said:

Under Section 1 of the Harter Act, therefore, Clauses 1 and 12 of the present bill of lading, taken by themselves, would appear to be void insofar as they attempt to shift the risk of lighterage to the goods.

Appellee relies primarily, however, upon Clause 4 of its bill of lading which purports to make *delivery* of the goods, and thus the termination of the carrier's statutory and contractual liability, concurrent with *discharge of the cargo* from the vessel, wherever that discharge may take place:

(Hereinafter the Court quotes portions of Clause 4).

The purpose of the clause is apparent. By equating 'discharge' with 'delivery' the carrier seeks to eliminate the operation of the Harter Act upon foreign trade. By fiat it seeks to secure immunity

> from liability which no combination of mere exculpatory clauses could achieve.'

Id. at 723 (emphasis in original).

The Court then said:

> The Harter Act does not define 'proper delivery'.

and

> It remains to be determined, therefore, whether such a delivery may be accomplished by the mere discharge of goods from the vessel, wherever that discharge may take place.[4]

Id. at 723.

The Court then said:

> Here, however, the lighter was not selected by the shipper nor by the consignee of the goods but by the carrier. Under these circumstances, a proper delivery requires, at the very least, the selection of, and the discharge of the goods onto a fit and safe lighter.

---

4. Thereafter the Court noted that in the Isthmian Steamship case the Court held that proper delivery under the Harter Act, in the absence of port customs and regulations to the contrary, constituted delivery at a fit and customary wharf. In Caterpillar the Court stated it was not required to determine whether proper delivery under a port-to-port contract may only be made by discharge onto a fit wharf. *Id.* at 724.

> This obligation, for the negligent performance of which the carrier bears full responsibility, might be found as an implied term of the bill of lading before us; but insofar as the lighterage clauses have been construed by both the parties and the Court below so as to relieve the carrier of this duty, we are constrained to hold the clauses null and void under Section 1 of the Harter Act.[5]

Id. at 724.

In sum, the Court held that under the Harter Act, Clauses 1, 4 and 12, to be invalid to relieve the defendant from the loss which had occurred before delivery. *See also Id.* at 724 n.2.

Regardless of whether the bill of lading in the case at bar is construed to require the defendant to deliver the cargo at San Croce Sull Arno or only to Leghorn, the cargo loss occurred before defendant had delivered the cargo at either place. The *Isthmian Steamship* and *Caterpillar Overseas* cases hold that when a contract of carriage provides that the carrier shall deliver cargo at a designated place, the Harter Act makes void any provisions in the contract which purport to relieve the carrier from responsibility for a loss which occurs prior to delivery. The bill of lading here involved contained such exculpatory clauses. Though factually distinguishable from the present case, the *Isthmian Steamship* and *Caterpillar Overseas* cases establish the principle which controls the instant one.

The defendant relies upon *Founder's Insurance Co. v. Pacific Far East Line, Inc.,* 1958 A.M.C. 901 (Cal. Super. 1958) and

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5. Where a loss occurred before delivery an exculpatory clause is void under the Harter Act and the carrier is liable without proof of negligence. *Id.* at 725 n.3.

Appendix A

Bristol Myers Co. v. Steamship Pioneer Land, 1957 A.M.C. 50 (S.D.N.Y. 1956). Neither case refers to the Harter Act.

In the *Founder's Insurance Company* case, plaintiff had shipped cargo from Long Beach to Hong Kong on the Old Colony Mariner owned by defendant and at Hong Kong it was transshipped to Bombay, India by the Ucka, a vessel not owned by the defendant. The port of discharge was stated to be Hong Kong and there the defendant delivered the cargo to the Ucka. The Court held that the defendant was not liable for goods damaged while in the possession of the Ucka. It said,

> This for the reason that the bill of lading excluded any and all liability on the part of the defendant if the damage or loss arose while the shipment was not in the actual custody of the defendant carrier. Such a limitation is permissible, as I read Section 7 of the Carriage of Goods by Sea Act of 1936 (46 U.S.Code, sec. 1307).

The decision is understandable since the point of discharge in the bill of lading was Hong Kong where defendant had discharged the cargo and delivered it to the Ucka.

In the *Bristol Myers* case no decision was referred to. It is not necessary to distinguish *Bristol Myers* from the present case. It was decided in 1956, prior to the decision in 1963 of *Caterpillar Overseas. Bristol Myers* was decided by a District Court in the Second Circuit whereas *Caterpillar Overseas* was decided by the Court of Appeals and, of course, it is the controlling authority.

Defendant also claims that the action should be dismissed under Clause 19 because of the failure of plaintiff to give notice

of the loss or damage in writing within three days of the delivery of the cargo. Clause 19 provides:

> 19. NOTICE AND SUIT TIME:
>
> Notice of loss or damage or any other claim of whatsoever description and its general nature must be given in writing to the carrier or its agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery; if the loss or damage is not apparent, the notice must be given within three days of the delivery. In any event, the carrier and the vessel shall be discharged from liability in any capacity unless suit is brought within one year after delivery or, if the goods are not delivered within one year after the date they should have been delivered.

[3] The container and its contents were stolen from the possession of the inland carrier on or about June 2, 1980, after the container and its contents had arrived but before deliver in Leghorn, Italy. (Aff. Benedetti, Doc. 10). On June 4, 1980, plaintiff was officially informed by defendant that the container was stolen. (¶5, Exh. D. attached to Plaintiff's Brief, Doc. 14). Defendant asserts in its brief that written notice required by Clause 19 was not received until June 9, 1980, which was more than three days after the date of the theft and hence the notice was untimely and defendant's motion for summary judgment should be granted.

The argument is rejected. The three day notice requirement in Clause 19 has application only if the loss is not apparent. This is what Clause 19 says. Obviously the theft was apparent because

on June 4, 1980, plaintiff was officially informed by defendant that the container was stolen. Furthermore, under the circumstances, it would be inequitable to bar plaintiff's claim. *See Delaware Steel Co. v. Calmar Steamship Corp.*, 378 F.2d 386 (3d Cir. 1967).

The motion of defendant for summary judgment will be denied..

APPENDIX B — DECISION AFTER TRIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 80-552 WKS

SKLUT HIDE AND FURS,
a Delaware Corporation,

Plaintiff,

v.

PRUDENTIAL LINES, INC.,
a Delaware Corporation,

Defendant.

Kester I.H. Crosse, Esquire, Wilmington, Delaware, attorney for plaintiff and Halley & Chalos, New York, New York of counsel.

Richard H. Bayard, Esquire, of Bayard, Brill & Handelman, P.A., Wilmington, Delaware, attorney for defendant and F. W. Meeker, Esquire, of Prudential Lines, Inc., New York, New York, of counsel.

MEMORANDUM OPINION

Wilmington, Delaware
December 23, 1983

STAPLETON, District Judge:

Appendix B

In this admiralty case,[1] plaintiff Sklut Hide and Fur Company (Sklut) has sued Prudential Lines, Inc. (Prudential), an ocean carrier, for the value of certain goods shipped on Prudential's vessel the S.S. Lash Atlantico. Sklut alleged that the goods were delivered to Prudential in New York for shipment to San Croce Sull Arno, Italy, via the Italian port of Leghorn. Sklut charged that its consignee never received the goods. Prudential, for its part, says the goods were stolen in Leghorn. This theft precludes any finding that Prudential is liable for Sklut's loss, Prudential says. The parties tried the case and submitted post-trial briefing. This opinion constitutes my findings of fact and conclusions of law.

The Facts

In the latter part of March, 1980, Sklut shipped four hundred bundles of wet salted cattle hides to San Croce Sull Arno, a town in Italy. The hides were to be shipped to the port of Leghorn and then carried overland to San Croce Sull Arno. Sklut contracted with Prudential for house to house shipping (i.e., Prudential was to handle the transportation of the hides from its terminal in New York to their destination in San Croce Sull Arno, including the overland portion of the journey).

The hides were in four hundred bundles. Each bundle measured approximately eighteen inches by twelve inches by eight inches. Morton Sklut, Sklut's president, testified that when bundles of hides are shipped without some kind of large container for all of them, Sklut wraps each individual bundle. Even though these hides were wet and quite odiferous Sklut did not wrap each bundle. Instead, the bundles were placed in a large metal

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1. Plaintiff invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1333.

freight container measuring some twenty feet in length. Prudential supplied the container to Sklut. After the bundles of hides were loaded into it, the container was taken by truck to Prudential at the 39th Street pier in Brooklyn. The container was loaded onto Prudential's ship the S.S. Lash Atlantico. Prudential issued a bill of lading for the container dated March 28, 1980. The face of the bill identified Sklut as the shipper, New York as the place of loading, the S.S. Lash Atlantico as the ship, and Leghorn as the place of discharge. Under "PARTICULARS FURNISHED BY SHIPPER" the following appeared:

MARKS AND NUMBERS	NO. OF PKGS.	SHIPPER'S DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT KILOS POUNDS
CONTAINER NO. 13CU-366-368-5	1 (20')	CONTAINER S.T.C.: 400 BUNDLES: WET SALTED CATTLEHIDES	25000# (11340-KILOS)

CLEAN ON BOARD - FREIGHT PREPAID
BEYOND CHARGES TO SAN CROCE SULL ARNO
PREPAID HOUSE TO HOUSE CONTAINER SERVICE

When the Lash Atlantico eventually reached Italy on April 29, 1980, it did not dock in Leghorn, as scheduled. It put in instead at Genoa, which lies some distance to the north of Leghorn up Italy's western coast. Prudential proferred no explanation for this change. Prudential unloaded the container in Genoa, and delivered it to a trucker for overland shipment from Genoa to San Croce Sull Arno.

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The hides never reached their appointed destination. While the truck sat parked in Leghorn on June 1, 1980, thieves took both the truck and the container carrying the hides. The Italian police recovered the truck and the container on June 11, 1980. The container was empty; the hides were never recovered.

Sklut proffered an invoice showing its loss to be $23,550.00 for the cost of the hides; $165.00 for inland freight, $1,538.57 for ocean freight, and gross profit margin of $3,788.04, for a total of $29,041.61. Sklut seeks recovery of this entire amount.

Prudential's lone witness was Mr. Henry O'Shaugnessy of its Claims Department. Notwithstanding the fact that O'Shaugnessy began working for Prudential in April of 1982, Prudential attempted to offer his testimony to show what happened to the hides. Sklut objected to his so testifying. He also testified that Italian customs practices required the goods be brought to their original destination to clear customs when they have been unloaded somewhere else. O'Shaugnessy's testimony as to everything except Italian customs practices was stricken under Rule 602 of the Federal Rules of Evidence. Prudential also produced a translation of an Italian police report on the theft, which read as follows:

LIVORNO POLICE HEADQUARTERS
MOBILE SQUADRON
C E R T I F I C A T E

At the request of the interested parties and for the uses in order, it is certified that on June 11, 1980, the articulated vehicle Fiat 690, license plate LI 232195 and trailer, license plate GF 16502, object of the theft report lodged on June 1, 1980

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by DELLA PIETRA Giorgio, born in Liveri (NS) on October 23, 1936, and residing in Livorno at No. 160, S. Carlo Street, was recovered by the Police Officers of the Calcinaia (PI) Station, abandoned in the parking lot of the "LA TORETTA WHITE" complex, located in Calcinaia, State Highway No. 439, and that at the time of recovery it still carried on board the container emptied of its load. Livorno, on September 14, 1983.

for THE CHIEF CONSTABLE
/sgd/

This report and its translation were admitted into evidence pursuant to a stipulation of the parties. The evidence thus shows that Sklut delivered the container to Prudential, that the Atlantico went to Genoa instead of Leghorn, that the container was never received, and that this damaged Sklut in the amount of $29,041.61. It also shows that the container was stolen in Leghorn. Sklut argues that under the governing law, it has proven, and Prudential has failed to rebut, its *prima facie* case. It also contends that Prudential's deviation to Genoa made Prudential into an insurer of the safety of the cargo, and that Prudential is therefore absolutely liable to it for the loss of the hides. Prudential contends that the fact that the loss was due to theft effectively absolves it from any finding of negligence and rebuts Sklut's *prima facie* case. It also argues that the deviation did not cause the loss and is therefore irrelevant to the case. Finally, Prudential contends that even if it is liable to Sklut, its liability is limited to $500 under the terms of the bill of lading.

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The Law

Sklut and Prudential agree that Sklut has established a *prima facie* case on the issue of liability by showing that it delivered the hides to Prudential and that Prudential did not deliver them to Sklut's consignee in Italy. Defendant's Post Trial Opening Brief at 8; Plaintiff's Post Trial Opening Brief at 2-3. They also agree that in the absence of liability based on deviation, Prudential cannot be held liable for Sklut's loss if the evidence indicates that the loss occurred without negligence on Prudential's part. Defendant's Brief, *supra*, at 8-9; Plaintiff's Brief, *supra*, at 3-4. Beyond these two points of agreement, Sklut and Prudential part company.

A. Deviation

Sklut argues that Prudential's deviation to Genoa made it an insurer of the cargo. Once the carrier deviates, Sklut asserts defenses set forth in the bill of lading and/or the Carriage of Goods by Sea Act (COGSA) vanish, and the carrier becomes absolutely liable for any loss the cargo suffers. While it is true as a general proposition that an unreasonable deviation may deprive a carrier of its defenses,[2] and while I assume for present purposes that Prudential's deviation has been shown to be unreasonable,[3] I nevertheless could not agree that Prudential's deviation renderd it liable for Sklut's loss. A carrier is not liable, even in the case of an unreasonable deviation, for any loss or

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2. General Electric Co. International Sales Division v. S.S. Nancy Lykes, 706, F.2d 80, 86-88 (2d Cir. 1983).

3. Under COGSA, a deviation for the purpose of loading or unloading cargo or passengers is regarded as *prima facie* unreasonable. 46 U.S.C. § 1304(4); *see* General Electric v. Nancy Lykes, *supra* note 2, at 85-86.

damage other that that resulting from the deviation. C. Black and G. Gilmore, *The Law of Admiralty* 180 (2d ed. 1975). *See also General Electric v. Nancy Lykes, supra* note 2, at 86-88. The evidence in this case shows that the theft occurred at Leghorn, the cargo's original off-loading point. If the deviation had not occurred, the hides would have been off-loaded onto a truck at Leghorn anyway. Thus, the deviation was complete before the theft. There is no reason to think that the circumstances of the loss would have been any different had the Lash Atlantico gone to Leghorn instead of Genoa. As such, the deviation did not cause Sklut's loss, and I reject Sklut's deviation argument.

B. Liability Based on Negligence

As noted above, the parties agree that Sklut proved a *prima facie* case by showing delivery of the hides to Prudential and Prudential's failure to deliver the hides to Sklut's consignee. They also agree that, as a result, Prudential has the burden of producing evidence which, if believed, would support an inference that the loss occurred without fault on its part.[4] I conclude that it has not carried that burden.

Prudential's evidence tends to show that the hides, along with the freight container and the truck, were stolen by a third party. It does not tell us anything about the circumstances of the theft and the conduct of the carrier leading up to the theft. While the evidence of the involvement of a third party tends to rebut

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4. The parties have not addressed the issue of whether a shipper or the carrier has the ultimate burden of persuasion with respect to carrier negligence and I agree that the issue need not be resolved here because of Prudential's failure to carry its burden of going forward with evidence.

the rather strong inference of carrier fault which arises when the shipper's evidence indicates possession by the carrier and non-delivery, the evidence of theft will not alone permit a reasonable fact finder to conclude that the theft occurred without carrier negligence. In short, some thefts of goods occur with carrier negligence, others without, and the evidence produced by Prudential simply does not permit one to do more than guess into which of these categories this case falls. Since Prudential has failed to meet its burden of going forward with evidence of a want of fault, the issue of liability must be resolved in Sklut's favor.

C. Amount of Damages

A final question remains. For how much is Prudential liable to Sklut? Prudential argues that if it is liable for the loss, its liability is limited to $500.00 under clause 17 of the bill of lading. That clause reads as follows:

> In case of any loss or damage to or in connection with goods exceeding in actual value of $500, lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per customary freight unit, on which basis the freight is adjusted and the carrier's liability, if any, in any capacity shall be determined on a value of $500 per package or per customary freight unit, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra value paid if required and in such

> case if the actual value of the goods per package or per customary freight unit shall exceed such declared, value and the carrier's liability, if any, in any capacity shall not exceed the declared value. Whenever less than $500 per package of other freight unit, the value of the goods in the calculation and adjustment of claims shall, to avoid uncertainties and difficulties in fixing value, be deemed to be the invoice value plus freight and insurance paid, whether any other value be higher or lower. It is agreed that the meaning of the word "package" includes a container, van, trailer, pallet-unit, animal, piece, article or thing constituting or containing goods shipped hereunder except goods shipped in bulk.

Prudential points out that under number of packages, in the bill of lading, Sklut listed "1." *Supra* at 2. Further, the bill shows no valuation of the goods higher than $500.00. Prudential thus argues that its liability is limited to $500.00. For its part, Sklut ignores clause 17 and focuses instead on section 1304(5) of COGSA and interpreting cases. Section 1304(5) reads in relevant part as follows:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment

> and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

Sklut contends that under section 1304(5), each one of the four hundred bundles constitutes a package rather than the one container. As such, Sklut contends that it may claim damages of up to $500.00 per bundle, and Prudential is therefore liable to Sklut for the full amount of its claim.

Sklut correctly asserts that if COGSA applied, each bundle of hides would constitute a package, notwithstanding their shipment inside the container without wrappers, and that the parties would have been powerless to contract for a result less favorable to the shipper. *See Mitsui and Co. v. American Export Lines,* 636 F.2d 807 (2d Cir. 1981). COGSA applies by its own terms, however, only to losses occurring between the loading of the cargo onto the vessel and discharge of the cargo from the vessel. While Sklut and Prudential agreed in the bill of lading that the provisions of COGSA would have wider application, they also contracted that those provisions would not apply when the shipment was not in Prudential's custody. Clause 2 of the bill of lading states, in relevant part:

> The provisions of COGSA...are hereby incorporated herein and shall apply throughout the entire time the goods are in the carrier's custody, including periods of the carrier's custody, if any, before loading on or discharge from the LASH barge or other carrying vessel. The carrier shall not be liable in any capacity for any delay, non-delivery, loss or damage occurring

while the goods are not in its actual custody.[5]

In *Smythgreyhound v. M/V "Eurygenes"*, 666 F.2d 746 (2d Cir. 1981), the Court faced the question whether the cartons holding stereo equipment or the containers in which the cartons were placed for shipment were the relevant packages for purposes of COGSA's $500.00 per package limitation. While the Court ultimately held that COGSA applied and that the cartons—not the shipping container—were the packages for purposes of the limitation, it considered an argument similar to the one Prudential raises here.

> Appellants argue that...we should look to the intent of the parties to establish the meaning of the term

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5. See also Clause 10 of the bill of lading, "Transshipment," which stated in relevant part:

> Whenever the carrier or the Master may deem it advisable or in any case where the goods are consigned to a point where the vessel is not expected to discharge, the carrier or Master may, without notice, forward the goods or any part of the goods, before or after loading at the original or any intermediate port of shipment, or at any other place or places, even though outside the scope of the voyage or the route to or beyond the port of discharge or the destination of the goods, by any vessel, vessels, or other means of transportation by water, land or air, or by any such means, whether operated by the carrier or by others and whether departing or arriving, or scheduled to depart or arrive before or after the ship expected to be used for the transportation of the goods. The carrier, in making any arrangements for transshipment by any means of transportation not operated by it, shall be deemed the forwarding agent of the shipper and consignee without any responsibility whatsoever.

> "package." Our attention is directed to *Pannell v. United States Lines Co.*, 263 F.2d 497 (2d Cir. 1959), which held that "when COGSA does not apply ex proprio vigore, effect should be given to the parties' definition of package even if it is contrary to that which would control if COGSA were directly applicable. [citation omitted]
>
> Were this a case where the parties had defined what "package" means in the bill of lading, we would find [the carrier's] argument persuasive.

Id. at 751. Since the bill of lading did not supply a definition of package, the Court looked to COSGA and the *Mitsui* case.

The contract between Sklut and Prudential does define package. As clause 17 of the bill of lading says, Sklut and Prudential agreed that "the meaning of the word 'package' includes a container, van, trailer, pallet-unit, piece, article or thing constituting or containing goods shipped hereunder." I cannot avoid the conclusion that the container into which Sklut placed the hides for shipment and which Sklut listed as one package on the bill of lading constitutes the package for the purpose of clause 17. Parties to a contract may agree that the container will be the package, where COGSA does not apply. *See Smythgreyhound, supra.*

Conclusion

For the reasons stated above, I conclude that Prudential has failed to rebut Sklut's *prima facie* case by producing evidence that the loss of the hides was not due to Prudential's negligence. I find Prudential liable to Sklut, but only in the amount of $500.00.

APPENDIX C - ORDER OF THIRD CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 84-5209 and 84-5239

SKLUT HIDE AND FURS

vs.

PRUDENTIAL LINES, INC.

Sklut Hide and Furs,
a Corporation of the
State of Delaware,
Appellant in 84-5209

and

SKLUT HIDE AND FURS

vs.

PRUDENTIAL LINES, INC.,

Appellant in 84-5239

Appendix C

Appeal From the United States District Court
For the District of Delaware
D.C. Civil No. 80-0552
District Judge: Honorable Walter K. Stapleton

Submitted Under Third Circuit Rule 12(6) January 16, 1985

Before: HUNTER, HIGGINBOTHAM, *Circuit Judges,* and KELLY,* *District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

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*Honorable James McGirr Kelly, United States District Judge for the Eastern District of Pennsylvania, sitting by designation

Appendix C

BY THE COURT,

s/ James Hunter
JAMES HUNTER, III, *Circuit Judge*

Attest:

s/Sally Mrors
Clerk

Dated: Jan 29 1985

APPENDIX D — ORDER OF THIRD CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 84-5209 and 84-5239

SKLUT HIDE AND FURS

vs.

PRUDENTIAL LINES, INC.

Sklut Hide and Furs, a Corporation of the State of Delaware, Appellant in 84-5209

and

SKLUT HIDE AND FURS

vs.

PRUDENTIAL LINES, INC.,

Appellant in 84-5239

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

Appendix D

The petition for rehearing filed by

SKLUT HIDE AND FURS

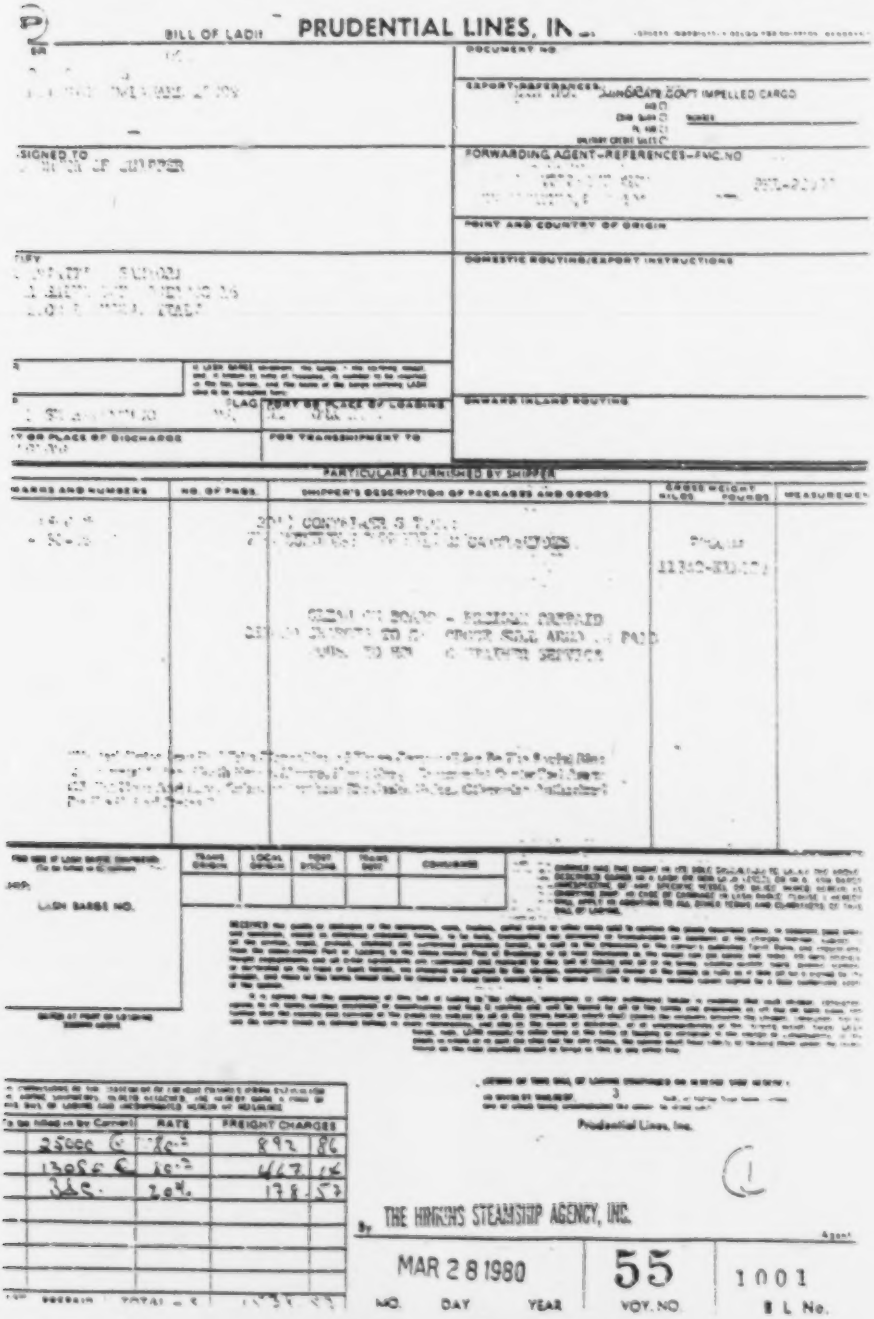
in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ James Hunter
Judge

Dated: February 26, 1985

APPENDIX E — FRONT AND BACK OF BILL OF LADING



BILL OF LADI[illegible] PRUDENTIAL LINES, IN[illegible]

DOCUMENT NO.

EXPORT-REFERENCES [illegible] GOV'T IMPELLED CARGO

[illegible]

[illegible]SIGNED TO [illegible] OF SHIPPER

FORWARDING AGENT-REFERENCES-FMC NO. [illegible]

POINT AND COUNTRY OF ORIGIN

[illegible]TIFY [illegible]

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

[illegible] FLAG [illegible] PORT OF PLACE OF LOADING

ONWARD INLAND ROUTING

[illegible]Y OR PLACE OF DISCHARGE [illegible] FOR TRANSSHIPMENT TO

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	SHIPPER'S DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT KILOS POUNDS	MEASUREMENT
[illegible]		[illegible] CONTAINER S[illegible] [illegible] CONTAINERS	[illegible]	
		[illegible] BOARD - [illegible] [illegible] TO [illegible] SHIPPER SHIPPER [illegible]		

[illegible]

TRANS ORIGIN	LOCAL ORIGIN	POST DISCHG	TRANS DEST	CONSUMER

[illegible]

LASH BARGE NO.

[illegible]

To be filled in by Carrier	RATE	FREIGHT CHARGES	
25000 C	80.-	892	86
13050 C	80.-	467	14
3 Sc.	20%	178	57

[illegible] TOTAL [illegible]

[illegible]

Prudential Lines, Inc.

By THE HIRKINS STEAMSHIP AGENCY, INC.

Agent

MAR 28 1980	55	1001
NO. DAY YEAR	VOY. NO.	B L No.

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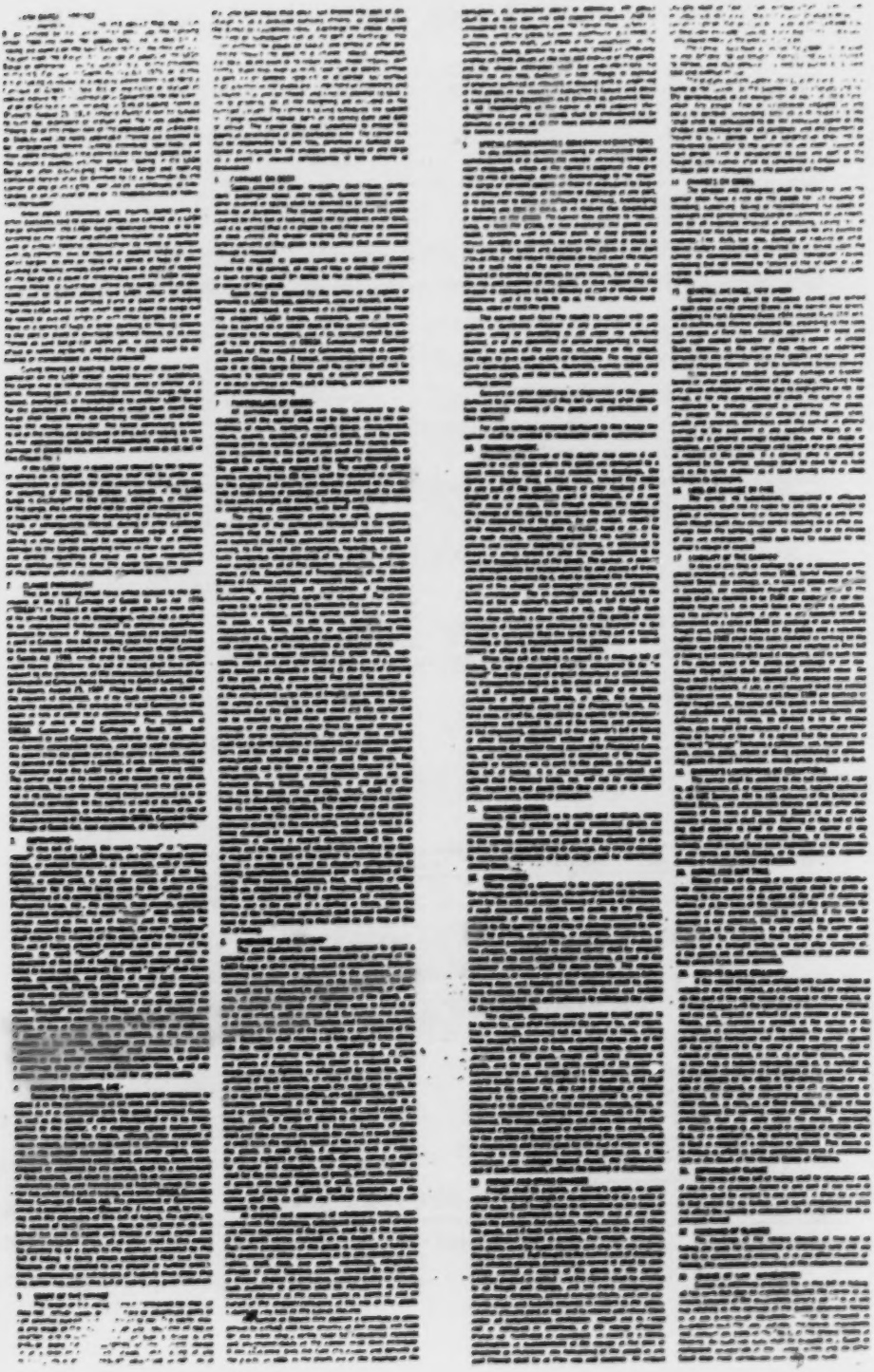
Appendix E